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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 802

KINNEAR-WEED CORPORATION,

Petitioner,

v.

HONORABLE JOE M. INGRAHAM,
UNITED STATES DISTRICT JUDGE,
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS NAMED BELOW

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BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

OPINIONS BELOW

No opinions have been written by either of the lower courts with respect to this case. The relevant orders of the Court of Appeals are set forth as Appendices C-1 to C-6 on Pages 27 to 34 of the petition. The order of the District Court denying Petitioner's motion to disqualify Judge Ingraham was entered December 30, 1964. A copy of that order is attached hereto as Appendix A.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

Petitioner filed a motion to disqualify the District Judge, to which was attached an affidavit purporting to allege bias and prejudice on the part of the judge. Upon the judge's refusal to disqualify himself, Petitioner filed motions in the Court of Appeals to stay proceedings in the case, and petitions for mandamus and prohibition to compel the judge to disqualify himself. All of Petitioner's motions and petitions to the Court of Appeals were denied. In the light of these facts, the questions presented are:

I.

Whether the refusal of a District Judge to disqualify himself upon the filing of a purported affidavit of disqualification under 28 U.S.C. § 144 is reviewable by petition for mandamus or prohibition.

II.

Whether Petitioner's motion to disqualify Respondent, Judge Ingraham, and the supporting affidavit attached thereto, are legally sufficient to raise the question of Respondent's disqualification.

STATUTES INVOLVED

The statutes involved, 28 U.S.C. §§ 137, 144 and 455, are set forth on Pages 35 and 36 of the petition.

STATEMENT

Petitioner filed its complaint in the United States District Court for the Southern District of Texas, Houston Division (R. 95). The civil docket (R. 19) printed as Appendix B-1 to the petition (pp. 22-25) indicates that the case was originally assigned to the Honorable Allen B. Hannay, one

of the judges of that court. At some date not expressly shown by that docket, it was transferred to the Honorable Joe M. Ingraham, another of the judges of that court. The docket entries for February 3, 1964, and February 11, 1964 (Petition, p. 25) indicate that on the first of those dates Judge Ingraham presided at an oral hearing on a motion brought by Petitioner and that on the second of those dates he signed and entered an order with respect to continuing the deposition of a witness. It was not until August 19, 1964, that Petitioner filed a motion to disqualify Judge Ingraham, together with a supporting affidavit of C. W. Kinnear, President of Petitioner (R. 89-90).

Petitioner appears to be asserting in that motion and affidavit, first, that Judge Ingraham has no jurisdiction in the cause because it was originally assigned to Judge Hannay and, secondly, that his willingness to proceed in the cause and his setting of a pre-trial conference at the request of one of counsel for Respondents indicates a personal bias and prejudice against Petitioner.

Upon Judge Ingraham's failure to disqualify himself in response to the motion and affidavit, Petitioner filed consecutive petitions for writs of mandamus and prohibition in the Court of Appeals and complains here of the denial of those petitions by that court.

ARGUMENT

Petitioner's claim that Judge Ingraham is "without jurisdiction", which is the basis of its further claim of disqualification, is wholly baseless. 28 U.S.C. § 137 is liberal and flexible in its provision for the division of business among the judges of a court having more than one judge. Unquestionably, Petitioner's case was originally assigned to Judge Hannay, but the docket clearly shows that it was

later assigned to Judge Ingraham. Petitioner has no vested interest in having its case tried by a particular judge, and no standing whatever to challenge the allocation of business among the judges of the court. *Hvass* v. *Graven* (CA 8, 1958) 257 F. 2d 1, certiorari denied 358 U.S. 835, 3 L. Ed. 2d 72, 79 S. Ct. 58. It is significant also that in February, 1964, Petitioner procured a continuance of the taking of the deposition of its president from Judge Ingraham and made no complaint about his alleged lack of jurisdiction or disqualification until August 19, 1964.

Even if it be assumed, arguendo, that Petitioner had not waived any question of disqualification and had filed a sufficient affidavit, review of the District Court's refusal to disqualify would be properly available to Petitioner through appeal and not by writ of mandamus or prohibition. *Albert* v. *U. S. Dist. Court for Western Dist. of Mich.* (CA 6, 1960) 283 F. 2d 61, certiorari denied, 365 U.S. 828, 5 L. Ed 2d 706, 81 S. Ct. 713; *Korer* v. *Hoffman* (CA 7, 1954) 212 F. 2d 211, 45 A.L.R. 2d 930. As stated in *Albert:*

> "In our view, the consideration by the District Judge of the sufficiency of the affidavit of bias and prejudice is not a ministerial, but a judicial act.
>
> "Mandamus does not lie to compel a judge of an inferior court to reverse a decision made by him in the exercise of a legitimate jurisdiction. Ex parte Flippin, 1876, 94 U.S. 348, 24 L. Ed. 194, or to compel him to decide according to the dictates of any judgment but his own, United States v. Lawrence, 1795, 3 Dall. 42, 1 L. Ed. 502, or to control the exercise of his discretion. Gottlieb v. Rubenstein, 6 Cir., 1958, 252 F. 2d 779. This remedy is reserved for really extraordinary causes. It may not be used as a substitute for appeal. Roche v. Evaporated Milk Association, 1943, 319 U.S. 21, 63 S. Ct. 938, 87 L. Ed. 1185; Beneke v. Weick, 6 Cir., 1960, 275 F. 2d 38." (p. 62 of 283 F. 2d)

But Petitioner's affidavit of disqualification was clearly insufficient. 28 U.S.C. § 144 provides in pertinent part:

> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists . . . "

Conclusions will not suffice. *Simmons* v. *United States* (CA 5, 1937) 89 F. 2d 591, certiorari denied 302 U.S. 700, 82 L. Ed. 540, 58 S. Ct. 19; *Scott* v. *Beams* (CA 10, 1941) 122 F. 2d 177, certiorari denied 315 U.S. 809, 86 L. Ed. 1209, 62 S. Ct. 794.

The allegation that Judge Ingraham "pirated" a case from a fellow judge, even if taken as a fact instead of a conclusion, would not tend to show bias or prejudice toward either Plaintiff or Defendants in the litigation. Petitioner's other allegation, that Judge Ingraham "did the bidding" of Defendants in ordering a pre-trial hearing as requested, obviously states no fact showing, nor raises any implication, of bias or prejudice in favor of or against either of the parties to the litigation. However, even an adverse ruling is not legal ground for disqualification. *Martin* v. *United States* (C.A. 10, 1960) 285 F. 2d 150.

While it is true that the judge who is alleged to be disqualified cannot pass upon the truth or falsity of the allegations of fact set out in the affidavit, it is equally true that he can and must pass upon the legal sufficiency of the affidavit; that is, whether or not the affidavit actually states facts which would form the basis for a charge of personal bias and prejudice. In *Hurd* v. *Letts,* 152 F. 2d 121, the Court of Appeals for the District of Columbia, in holding that a trial judge had acted properly in refusing to dis-

qualify himself upon the filing of an insufficient affidavit, wrote as follows:

> "Nothing is now better established than the rule that a sufficient affidavit under the statute must state facts and reasons which tend to show personal bias and prejudice regarding the justiciable matter pending and must give support to the charge of a bent of mind that may prevent or impede impartiality of judgment. Berger v. United States, 255 U.S. 22, 33, 41 S. Ct. 230, 65 L. Ed. 481.
>
> "Accordingly, the question in all such cases is whether the affidavit asserts facts from which a sane and reasonable mind might fairly infer personal bias or prejudice on the part of the judge . . ." (pp. 121-122)

The same court in *Eisler* v. *United States*, 170 F. 2d 273, after reiterating the above quoted language, said:

> "We are of the opinion that the lower court properly determined, as the second ground for striking the affidavit, that it was legally insufficient to show personal bias or prejudice regarding the justiciable matter pending before the court. The Supreme Court has ruled that the judge has a lawful right to pass on the legal sufficiency of the affidavit, Berger v. United States, 1921, 255 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481, subject to appellate review, of course, and we consider it the duty of the judge, when the showing for recusation is insufficient, to remain in the case." (p. 278)

CONCLUSION

It is clear that Petitioner's affidavit of disqualification was insufficient as a matter of law and that, in any event, Petitioner is not entitled to the extraordinary relief it now seeks. It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Cornelius O. Ryan, counsel of record for Standard Oil Company, Respondent herein, and a member of the bar of the Supreme Court of the United States, hereby certify that I served a copy of the foregoing brief upon Kinnear-Weed Corporation, Petitioner herein, by depositing the same in a United States mail box, with first class postage prepaid, addressed to Petitioner's counsel of record, William E. Kinnear, at his post office address, 419-21 Beaumont Savings Building, Beaumont, Texas 77701, this ..... day of January, 1965.

.....

Cornelius O. Ryan

Counsel for Respondent
Standard Oil Company

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KINNEAR-WEED CORPORATION, *Plaintiff*, v. HUMBLE OIL & REFINING COMPANY, ET AL, *Defendants.*	Civil Action No. 63-H-509

KINNEAR-WEED CORPORATION, *Plaintiff*, v. HUMBLE OIL & REFINING COMPANY, ET AL, *Defendants.*	Civil Action No. 64-H-354

ORDER DENYING PLAINTIFF'S MOTION TO DISQUALIFY DISTRICT JUDGE JOE M. INGRAHAM

Plaintiff having filed in C. A. 63-H-509 Plaintiff's Motion to Disqualify District Judge Joe M. Ingraham, to which was attached the affidavit of C. W. Kinnear dated August 18, 1964, and the Court being of the opinion that the allegations in said affidavit, even if taken to be true, were and are insufficient as a matter of law to require the said Judge Ingraham to disqualify under 28 U.S.C.A. Sec. 144, it is therefore ordered, adjudged and decreed that Plaintiff's Motion to Disqualify District Judge Joe M. Ingraham be and it is hereby denied.

/s/ JOE M. INGRAHAM
U. S. District Judge
Entered December 30, 1964

APPROVED:
/s/ GARRETT R. TUCKER, JR.
/s/ CORNELIUS O. RYAN
Attorneys for Defendants